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No. 15,052

United States Court of Appeals
For the Ninth Circuit

See Vol. 2964

EMPIRE PRINTING COMPANY,
a corporation,

vs.

Appellant,

HENRY RODEN, et al.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

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**United States Court of Appeals
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EMPIRE PRINTING COMPANY,
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Appellees.

Upon Appeal from the District Court for the
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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The three actions of Henry Roden, Ernest Gruening and Frank A. Metcalf, plaintiffs, v. Empire Printing Company, a corporation, were consolidated for trial by the District Court, Territory of Alaska, Division No. 1. (R. 54.) The original complaints were filed October 1, 1952. The actions were founded on alleged libel charge against the appellant Empire Printing Company, and the cases as consolidated were tried before a jury at Ketchikan, Alaska, November 14-19, 1955. A motion for directed verdict was made by defendant in writing, argued and denied. The jury rendered its

verdict on November 21 in favor of appellees, awarding to each the sum of \$1.00 compensatory damages and \$5,000.00 punitive damages (R. 118-9.) The judgment was entered December 7, 1955. A motion for new trial or for judgment notwithstanding the verdict was denied. (R. 129-131.) The appeal was taken from the judgment by filing notice of appeal on December 7, 1955.

Jurisdiction of the District Court rests upon the Act of June 6, 1900; 31 Stat. 322, as amended; 48 U.S.C.A. sec. 101; and the jurisdiction of this Court on Section 1291 of the New Federal Judicial Code.

STATEMENT OF THE CASE.

The actions arose out of publication by defendant in its daily newspaper published at Juneau, Alaska, of a news article and editorial in which an account was given of the handling of certain public moneys and with comments and opinions of the reporter who wrote the news story and the editorial. These appeared in the issue of appellant's paper of September 25, 1952. The appellees also complained of a headline in the same issue entitled "REEVE RAPS GRAFT, CORRUPTION", and it appeared on the same page of the paper as the news story and editorial complained of, although there was no mention of either of the appellees in the Reeve headline or the article beneath it and of which it was the caption and no mention of anything involved in these actions. (Pltff's Ex. 1.)

The publications complained of, referred to in the amended complaints, are contained in Plaintiff's Exhibit 1, which is a copy of the newspaper published by appellant on September 25, 1952. Copies of the articles complained of are attached to the defendant's answers to the amended complaints as exhibits thereto. (R. 26-37.)

At the time of the publication involved the appellee Ernest Gruening was Governor of Alaska, Henry Roden was Treasurer, and Frank A. Metcalf was Highway Engineer. These three under the laws of the Territory constituted the Territorial Board of Road Commissioners. This Board under the law had certain jurisdiction and certain duties imposed upon it in connection with the construction and maintenance of roads, harbors, and harbor facilities. (See Secs. 41-2-1 and 41-2-2, A.C.L.A. 1949.) There appears no authority in the law for the purchase or operation of a ferry.

The appellees in 1951 purchased a ferry boat called the "*Chilkoot*" with funds of the territory, and had operated it during the season of 1951 between Juneau and Haines, Alaska. Apparently the purchase of the ferry and certain repairs made were defrayed out of a special fund under the control of the Highway Engineer known as the Motor Fuel Tax Fund (48-5-2, A.C.L.A. 1949), and it seems that the vessel was operated in 1951 through the use of this fund.

On June 5, 1952, the board met and decided to operate the ferry "as a private enterprise" with the

purser meeting some of the expenses out of the receipts rather than turning the money back into the general fund of the treasury. (Plaintiffs' Exhibit 9, not printed.) Thereafter one Robert E. Coughlin, who was then purser of the Chilkoot, was authorized to handle the receipts and disbursements of all funds in connection with the operation of the ferry, and he set up a bank account in the B. M. Behrends Bank at Juneau entitled "Chilkoot Ferry", and he was the only one authorized to handle that account and to issue checks against it. (R. 353, 369, 384, 409.) The salaries involved were paid in the regular manner on vouchers approved by the Auditor of Alaska, who was then Mr. Neil Moore. (R. 276-278.) All other disbursements were made and all other expenses paid by the purser Coughlin, who was selected to handle the fund by appellee Metcalf with the approval of the other appellees, who were members of the Board of Road Commissioners. (R. 353.)

On or about August 20, 1952, a check was issued on this Chilkoot Ferry fund by Purser Coughlin to Steve Homer, who was then employed on the ferry. He took this check to Neil Moore, the Auditor, and Neil Moore thereupon called the matter to the attention of the Attorney General, and Moore and John Diamond, Assistant Attorney General, went to the bank and closed the fund. (R. 282.) Homer later on suggested to Jack Daum, a reporter for the appellant, that there was something wrong with the ferry fund and suggested that he see the Auditor and get particulars. (R. 460, 461, 524.)

On September 25, 1952, the appellant in its newspaper published the articles complained of, giving Neil Moore, Auditor, as their authority for the facts and quoting in full a letter from Moore to the Attorney General regarding the ferry fund. (R. 30, 31, and Plaintiffs' Exhibit 1, not printed.)

A short time thereafter the libel suits were filed against the Empire Printing Company by the three appellees. These suits are almost identical, and the questions of fact and issues of law involved are the same excepting in one particular as to appellee Metcalf, which will be referred to later on.

In the amended complaints the plaintiffs alleged that they constituted the Alaska Board of Road Commissioners and they operated the ferry Chilkoot and paid the costs in part from the revenues received. It is alleged that the articles complained of, both the news item and the editorial, draw a parallel between the setting up and operation of the Chilkoot Ferry fund and the case of Oscar Olson, a former territorial treasurer who was indicted for the crime of embezzlement and sentenced to serve a term in the penitentiary. The amended complaints alleged that the publications complained of were malicious and intended to convey to the entire community that appellees were dishonest and corrupt and guilty of embezzlement and of converting funds of the territory to their own use in violation of law, and that the publications were the culmination of a campaign of falsehood, misrepresentation and calumny intended to disgrace appellees and their assistants in the administration of the affairs of

the territory. Plaintiff Gruening prayed for damages in the sum of \$200,000, one-half of which was alleged to be compensatory damages and one-half sought as punitive damages; appellee Roden sued for \$100,000, dividing his equally between compensatory and punitive damages. (R. 7.) Appellee Metcalf, while making the same allegations in his complaint as the others, did not in the prayer of his complaint ask for any division of the amount sued for into compensatory and punitive damages; he simply sued for \$100,000 damages. (R. 17.)

The appellant in its answers to the amended complaints admitted certain of the facts alleged such as the residence of plaintiffs, that they constituted the Board of Road Commissioners, that the appellant published the paper, that the appellees purchased the Chilkoot Ferry and operated it, and that Oscar Olson, former territorial treasurer, was convicted of embezzlement and sentenced to the penitentiary. It admits the publication but denies that it was false, scandalous, defamatory or libelous, or that it was intended to convey information that appellees had converted funds of the territory to their own use; denies that there was any campaign of calumny, falsehood or misrepresentation and denies that appellees' reputations were injured. It sets up three affirmative defenses, pleading the truth of the facts stated in the articles, and that these facts were all on record in the office of the Auditor; that the opinions in the publication were fair comment and privileged criticism based on facts. It alleges that it is the duty of the newspaper to inform the public of all acts of public of-

ficials and further alleges that through the handling of the ferry fund there was a substantial loss of public funds; that the appellees were all public officials, two of whom were elective and the other one appointive; that all matters stated in the publications were of public concern, the opinions expressed were justified, and that all facts were available to the public, and that the opinions were not expressed for the purpose of causing harm to anyone and dealt only with the public conduct of public officials. (R. 18-53.)

The amended answers also alleged that Roden and Metcalf were interviewed before the articles were published and their explanations were published on the same page as the offending articles. It is further alleged in the third affirmative defense that on the following day an explanation was published on the front page of the newspaper issue of that day explaining that there was no charge in the article that the appellees had actually stolen any funds or converted any to their own personal use. (R. 25, 37.)

In connection with the pleadings and Appellees' Exhibit 1, it will be seen that the parallel mentioned to the Oscar Olson case was "in the receipt and disbursement of public funds".

It will be helpful to the court at this point to call attention to the statutes of Alaska involved in this case and which were so frequently discussed during the trial.

Section 12-2-1, A.C.L.A. 1949, reads as follows:

"Every office, board, commission or bureau authorized to collect or receive any fees, licenses,

taxes or other money, and every office, commission or bureau of the United States or other authorized agency, authorized to collect any fees, licenses, taxes or other money, belonging to this Territory, shall account for and pay such fees, licenses, taxes or other money, less any fees he may be entitled to under existing law, to the Territorial Treasurer at least once each month and the same shall be covered into the general fund.”

Section 12-3-1 reads:

“Disbursing officers of the Territory of Alaska shall (1) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment, or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers; (2) make such examination of vouchers as may be necessary to ascertain whether they are in proper form, duly certified and approved, and correctly computed on the basis of the facts certified; and (3) be held accountable accordingly.”

These are the statutes which deal with the duty of every person, board and commission in the matter of the receipt and disposal of public funds of every nature.

In 1951 the Alaska Legislature passed Chapter 133 S.L.A. 1951, the provisions of which superceded some of the provisions of the former law including section 12-2-1. Section 14 of that act provides as follows:

“All receipts from any source whatever shall be forwarded to the Territorial Treasurer each day

or as promptly as practicable, and at the same time a report of all receipts since the last previous report and of the disposition thereof shall be submitted to the Commissioner of Finance by the depositing agency."

The Attorney General in an informal offhand opinion held that Chapter 133, S.L.A. 1951, was invalid; and it was never put into operation, but the distinction between these provisions and those of section 12-2-1, A.C.L.A. 1949, are actually immaterial to this case, for both provide that all funds received by any person for the territory or in which the territory has an interest shall be deposited with the treasurer.

The trial court in its instructions to the jury refers to both the provisions of the Alaska Compiled Laws Annotated and those of Chapter 133, S.L.A. 1951, and he states that these are substantially the same. (R. 103.)

Section 65-5-63, A.C.L.A. 1949, reads as follows:

"Embezzlement of Public Money. That if any person shall receive any money whatever for said Territory or for any county, town, or other municipal or public corporation therein, or shall have in his possession any money whatever belonging to such Territory, county, town, or corporation or in which said Territory, county, town, or corporation, has an interest, and shall in any way convert to his own use any portion thereof or shall loan, with or without interest, any portion thereof, or shall neglect or refuse to pay over any portion thereof as by law directed and required, or when lawfully demanded so to do, such person shall be

deemed guilty of embezzlement, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by fine equal to twice the amount so converted, loaned, or neglected or refused to be paid, as the case may be."

This is the section under which Oscar Olson, former treasurer, was sentenced. (R. 102.)

It is well to bear in mind that while Olson was convicted of actually converting territorial funds to his own use, (Defts. Ex. "J" and Appendix A), he was sentenced under the last quoted section which makes it a crime for any person to either convert to his own use public funds, loan them with or without interest, or "neglect or refuse" to pay them over as by law directed or required. The appellant throughout the trial insisted that the parallel to the Olson case consisted in setting up the same device for the handling of territorial funds in both cases. (Testimony of Neil Moore, R. 283, 295-299.) In the Olson case the funds were converted to his own use, while in this case the appellant contends the funds were not turned over to the territory or the general fund of the territory as the law requires, and they were lent to a bank when the special ferry fund was set up. They were entrusted to an unauthorized person, namely, the purser of the ferry boat Chilkoot, who was not required to furnish a bond. (R. 423.)

The appellant alleged in its answers and offered to prove that a substantial portion of the public funds so going through this very account had been lost irre-

trievably. This evidence was rejected by the court. (R. 105, 606-616.)

The record in this case is rather long, much of the testimony deals with the question of malice and many pages of it are argumentative and the expression of opinions of the witnesses. The instructions are lengthy and the appellants' proposed instructions, most of which were denied, consisted of many pages, so for the sake of the convenience of the court, we shall not attempt to set them forth verbatim, but will call attention to the pages of the record where they are found and to the objections made to them, the court's rulings thereon, and the exceptions taken.

Appellants' specifications of error and points to be relied upon in this appeal are 21 in number, but for the sake of convenience and in order to avoid too long a brief, we shall attempt to group the arguments under a few headings. Several specifications may be included under each of the several headings. Appellant contended throughout the trial and now urges that the court was in error in holding and ruling as follows:

1. That the published articles were libelous per se;
2. That the appellees committed no crime and no offense involving criminal punishment;
3. That in order to be guilty of violation of the law as charged in the articles, it must be shown that the appellees actually converted territorial funds to their own use;
4. That the criminal acts of an agent, even though illegally appointed, is not to be attributed to the principals;

5. That the law presumes the publications were made maliciously, and that this arises from the publication itself;
6. That the truth of a publication is no defense unless known at the time;
7. That the evidence regarding loss of public funds which appellant offered and which was rejected was immaterial and inadmissible;
8. That the jury might take into consideration the headline referring to "Reeve Raps Graft, Corruption".
9. That the checks which were issued on the ferry fund by Robert E. Coughlin to disburse public moneys were not material and their disappearance and loss and nonproduction after demand was immaterial;
10. That the deposit of money in a bank in a checking account does not constitute a loan within the meaning of the statute;
11. In admitting into evidence the Fred McGinnis letter. (Plaintiffs' Exhibit 8, R. 186.)

SPECIFICATIONS OF ERROR.

1. The court erred in holding and ruling, and instructing the jury, that since 12-2-1, A.C.L.A. 1949, did not provide any criminal penalty for its violation and that therefore plaintiffs could not lawfully have been charged with any criminal act for violation of that section, no testimony could be introduced to show that any loss of public funds had occurred through appellees' violation of section 12-2-1. (R. 102, 104, 105, 606-616.)

2. The court erred in rejecting the testimony of Steve Homer under appellant's offer of proof and which testimony was offered to show a loss of public funds and which loss resulted ^{from} ~~in~~ a violation by appellees of section 12-2-1, A.C.L.A. 1949; and in rejecting all other testimony of appellant tending to support the testimony offered through Steve Homer. (R. 606-616.)

3. The court erred in holding that an agent's criminal acts cannot be imputed to the principal even where the agent is appointed to perform an illegal act. (R. 674.) (In this case the appellees admitted the facts constituting a violation of section 12-2-1, A.C.L.A. 1949, and appellant offered to show a loss of public funds resulting from this violation of the law and that the loss of public funds was a violation of section 65-5-63, A.C.L.A. 1949.)

4. The court erred in holding that the violations by appellees of section 12-2-1, A.C.L.A. 1949, was not also a violation of section 65-5-63, A.C.L.A. 1949. (R. 102, 665-6.)

5. The court erred in instructing the jury that the articles published by appellant, which are the basis of the action, constituted libel per se. (R. 97-8.)

6. The court erred in holding that the canceled checks issued on the special ferry fund were immaterial and that their loss by the appellees or others who had them in their possession was immaterial in these cases. (R. 672-3.)

7. The court erred in holding that bank deposits and checking accounts do not constitute a loan, creat-

ing the relationship of debtor and creditor between the bank and the depositor. (R. 102-666.)

8. The court erred in admitting in evidence, over the objection of appellant, a printed copy of a letter purported to have been written by Fred McGinnis. (Plaintiffs' Exhibit No. 8.) (R. 186.)

9. The court erred in giving that portion of Instruction No. 3 which reads as follows (R. 97):

“You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se.

“These presumptions of law make it unnecessary for the person to whom the commission of crime is imputed to prove malice or injury; but he may nevertheless make such proof for the purpose of showing the extent or degree of malice and of the injury and damage to his reputation and for the purpose of enhancing his recovery.”

10. The court erred in giving Instruction No. 6 (R. 104-5) and particularly that portion of it which reads:

“the defendant must show by a preponderance of the evidence that plaintiffs handled the money

wrongfully and fraudulently and with a criminal intent to convert such to their own use."

11. The court erred in giving Instruction No. 7 (R. 105) where the court instructed the jury to disregard all testimony regarding the loss of public funds as not relevant to the issues involved and which instruction was based on the fact that appellant did not mention a loss of funds in the publication of September 25, 1952, and that therefore the loss of public funds was not an issue in the case and therefor was not relevant to the truth or falsity of the publication. In this connection defendant's proposed Instruction No. 22 (R. 85) was offered to the effect that the truth, whenever discovered, is a complete defense in a libel action. The court erred in denying that instruction.

12. The court erred in giving to the jury Instruction No. 4 and particularly paragraph one thereof. (R. 98.)

13. The court erred in giving a portion of Instruction No. 5 and particularly that part of it which reads as follows:

"You are further instructed that aside from the statutes above noted defining the crime of embezzlement of public funds, there is no statute in Alaska making a violation of the law relating to the receipt and disbursement of public funds by Territorial officials a crime, or subject to criminal prosecution." (R. 102-3.)

14. The court erred in giving that portion of Instruction No. 5 which reads as follows:

"Further that the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds." (R. 102.)

15. The court erred in giving Instruction No. 7 which reads as follows:

"During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry "Chilkoot" by the purser. You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication." (R. 105.)

16. The court erred in giving the first paragraph of Instruction No. 8 (R. 106), for the reason that the rejection of the testimony offered to show the loss of public funds through the acts of appellees made it impossible for appellant to establish in detail the truth of the claim of loss of public funds so as to show the close parallel of the case to that of Oscar Olson. Furthermore, the court erred in stating that this was not pleaded whereas it was set forth in paragraph three, second affirmative defense. (R. 21, 41, 49.)

17. The court erred in giving paragraph two on page two of Instruction No. 8 (R. 107), relating to

retraction, as there was no retraction involved in the case.

18. The court erred in refusing to give defendant's proposed Instructions Nos. 4, 5, 6, 7, 8, the last paragraph of No. 9, No. 10, No. 11 with the exception of the last sentence thereof which the court did give, Nos. 12, 13, 14, 16, 18, 20, 22, 23, 24, 26, 27, 28, 29, and 30. (R. 60-91.) Exceptions allowed: R. 688.

19. The court erred in submitting to the jury for its consideration the headlines in the publication of September 25, 1952, entitled "Reeve raps graft, corruption". (R. 665.)

20. The court erred in overruling appellant's motion for instructed verdicts and in permitting the cases to go to the jury. (R. 57.)

21. The court erred in overruling defendant's motion for judgment notwithstanding the verdict or for a new trial, and entering judgment for plaintiffs. (R. 129-131.)

All emphasis in this brief is ours unless otherwise stated.

SUMMARY OF ARGUMENT.

Appellant insists that the facts published by it on September 25, 1952, out of which these actions arose, were true, and that they were obtained from official source; that the truth is a complete defense in an action for libel; and appellant further insists that the parallel to the Olson case referred to in the articles

was "*in the matter of receipt and disbursement of public funds*".

Appellant submits for the following reasons that the judgment of the trial court is wrong, and that there should have been a directed verdict in favor of the defendant in the lower court, and it contends here, as it did in the lower court, that certain errors were committed by the court throughout the entire trial as follows:

I.

It was error for the trial court to give that portion of Instruction No. 3 (R. 97) which reads as follows:

"You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. . . ."

It will be noted that the court in this portion of the instruction omitted to use the word "false" before the word "publication" in the first line.

In this connection the court overruled the appellant's request for a holding and instruction that the publication was not libelous per se unless it was capable of only one construction, which in itself constituted libel. (R. 56-7.)

The appellant pointed out that the facts regarding the setting up and handling of the special ferry fund were admitted by all of the appellees and that the

only meaning which could be ascribed to the published articles was that in this connection they were charged in the articles with having done the same thing as Oscar Olson "*in the matter of receipt and disbursement of public funds*" and nothing more.

Appellees claim that the articles could be interpreted as meaning that the appellant was charging the appellees with stealing public funds or converting them to their own use, whereas there is nothing of that nature contained in the publication.

II.

The court erred in holding and instructing the jury that appellees had committed no crime and no offense involving criminal punishment by setting up the special ferry fund and depositing the earnings of the ferry in a special bank account subject to check only of an unauthorized person who was ~~not~~ a territorial official. (R. 103.)

In Instruction No. 5 (R. 100-104) the court refers to sections 11-3-8, 12-2-1 and 12-3-1 A.C.L.A., referred to in the letter from Neil Moore published in the newspaper (Plaintiffs' Exhibit 1), and then instructs the jury in the last paragraph of Instruction No. 5 (R. 104) as follows:

¹⁰³ "No penalty is provided for violation of any of these provisions of law; but Section 12-3-3 A.C.L.A., provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not rep-

resent a legal obligation of the Territory, which liability may be enforced by civil action."

This instruction plainly told the jury that what the appellees had done in setting up the special ferry fund and causing it to be disbursed by their agent did not constitute a crime, whereas section 12-2-1, A.C.L.A. 1949, directs all persons having public moneys in their hands or under their control to pay them over to the territorial treasurer to be converted into the general fund, and section 65-5-63 provides a penalty for refusing or neglecting to do this, and section 65-5-63, A.C.L.A. 1949 is the statute under which Oscar Olson was sentenced. (R. 102.)

The whole of Instruction No. 5 (R. 100-104) is certainly misleading and contradictory. The court again in Instruction No. 5 (R. 103) uses the following language:

"Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime, that is, punishable by fine or imprisonment, or removal or disqualification from office."

The court again in Instruction No. 6 instructed the jury:

"... that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show,

to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use. In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or to deprive the Territory thereof.” (R. 104-5.)

III.

The court erred in ruling and holding that in order to be guilty of a violation of the law it must be shown that the appellees actually converted territorial funds to their own use.

What applies to the foregoing paragraph II is equally applicable here.

IV.

The court erred in taking the position all through the trial that the appellees were not criminally responsible for any acts of the purser Robert E. Coughlin, who they say was their agent (R. 353, 369, 384, 409) and who was appointed by them to have sole charge of the ferry fund. In this connection the court erred in denying appellant's proposed Instruction No. 27, and particularly that portion of it which reads as follows:

"If an agent is appointed to perform an illegal act and he does it, the one appointing him is responsible criminally, and if a tort is committed, he is civilly liable."

Restatement: Agency, Volume 1, section 19.

"The possession of the ferry funds by Coughlin was the possession by plaintiffs. The disbursement of funds by Coughlin was the same as if it had actually been done personally by plaintiffs, and the loss of any portion of the funds would therefore be attributable to plaintiffs." (R. 88-9, and 674.)

V.

The court erred in instructing the jury and in holding throughout the trial that the law presumes the publications were made maliciously and that this malice arose from the publication itself. What we have said under hearing No. I applies to No. V also and will be discussed in detail hereinafter.

VI.

The court erred in ruling consistently that the truth of a publication constituted no defense unless it was known at the time of publication.

While the appellant claims that since the facts set forth in the publication were true and that these facts constituted a violation of the law on the subject of embezzlement (section 65-5-63, A.C.L.A. 1949), still to overcome the court's holding, that refusal by the appellees to pay over public moneys coming into their hands, to the general fund of the territory, as the law directed, constituted no crime unless it was shown

that the funds were lost or embezzled, we offered evidence to show that there was actually a considerable loss of public funds through the appellees' method of handling them, and there was a violation of the statute which directed them to pay these funds into the general fund of the territory. This offer of proof was denied by the court and objections were sustained to our offer and to our questions. (R. 606-616 and Instruction No. 7, p. 105.)

We introduced in evidence Defendant's Exhibit C, consisting of two reports made by appellees' own auditor, Chris Ehrendreich, a public accountant, of the ferry fund. Another one is Defendant's Exhibit E, consisting of report of the official auditors of the Territory, Arthur Anderson Company, for the years 1951 and 1952, showing a shortage of ferry funds. These exhibits are not printed. Then we offered the testimony of Steve Homer to prove in detail the method by which the ferry funds were handled by purser Coughlin, and to show irregularities and loss of funds. (R. 606-616.) All this testimony was rejected, and our instructions on this point refused, for the reason that the appellant was not in possession of all the facts with reference to the loss of public funds at the time the articles were written but came into possession of those facts afterward and set up the loss of funds in its answers. (R. 21, 41, 49.)

VII.

The court erred in holding that the evidence regarding loss of public funds which appellant offered and the court rejected was immaterial and inadmis-

sible. (R. 608, 611.) What has been said under No. VI applies also to No. VII.

VIII.

The appellees charged that certain headlines in Plaintiffs' Exhibit 1 entitled "Reeve raps graft, corruption" being on the same page of the newspaper and alongside the articles referring to the appellees would give the reader the impression that the graft and corruption meant and referred to the appellees. In this connection appellant contended that the headline must be read in connection with the article of which it was the caption and which had not the remotest connection with the appellees.

Appellant raised this point on its motion for an instructed verdict, which was denied by the court (R. 55-6) and then the court refused to give Defendants' Proposed Instruction No. 5 to the effect that this headline should have no place in the jury's deliberations. (R. 62, 665.)

IX.

The court erred in rejecting Defendants' Proposed Instruction No. 18 regarding the absence of all cancelled checks issued on the ferry fund, which checks must have been in appellees' possession and were not available to defendants at any time. The defendants in this connection introduced proof that the cancelled checks could not be found in the office of the Treasurer, Highway Engineer, Finance Director, or Mrs. Coughlin, the widow and executrix of the estate of

Robert Coughlin, deceased (Defendants' Exhibits F, G and H, not printed, and testimony of Minnie Coughlin, R. 602-3.) The court held that the nonproduction of these checks was immaterial (R. 672-3), notwithstanding the statute of Alaska quoted in the first two paragraphs of Defendants' Proposed Instruction No. 18. (R. 80-1.)

X.

The court erred in holding that a deposit of money in a bank in a checking account does not constitute a loan within the meaning of the statute. This is contrary to law and was highly prejudicial to the appellant, as we shall discuss hereinafter.

XI.

The court erred in admitting into evidence a purported copy of a letter said to have been written by Fred McGinnis. (Plaintiffs' Exhibit 8; R. 186.)

This letter was hearsay, incompetent and immaterial for any purpose, and its introduction and presentation to the jury was highly prejudicial.

In order not to make this summary too long and for the reason that we shall endeavor to confine this brief within the compass of the prescribed length, we have not set up in the summary the authorities applicable to our contention regarding the errors committed, but will go into that in more detail in the argument which follows.

ARGUMENT.**THE UNDISPUTED FACTS.**

We submit the following facts from the record about which there would appear to be no dispute:

Appellees as the Board of Road Commissioners of Alaska in 1951 purchased the ferry "CHILKOOT" to carry freight and passengers between Juneau and Haines, Alaska. There was no legislative authority for the purchase or operation. (R. 345.) Defendant's Exhibit D, not printed, is a report of the Highway Engineer, appellee Metcalf, for the years 1951 and 1952. This shows that the total expense in the purchase, repair and operation of the ferry "CHILKOOT" for the years 1951 and 1952 exceeded the revenue from the operation by over \$112,000.00. (Defts. Ex. D, pp. 11 and 13.) The deficit was paid from a road and harbor fund known as the Motor Fuel Tax Fund, which was under the jurisdiction of the Highway Engineer. (R. 389, 390.) On June 5, 1952, the board, consisting of the three appellees, held a meeting at Juneau. The minutes were introduced in evidence as Plaintiffs' Exhibit 9. (R. 351-2.) The following is an extract from those minutes:

"Mr. Roden felt that as long as every cent is accounted for, the ferry could be operated in part as a private enterprise and the purser could meet some of the expenses out of receipts rather than turn it back into the general fund. This recommendation was unanimously approved by the board. The Attorney General, Mr. Williams, offered no objections."

Mr. Robert E. Coughlin was employed by Metcalf as purser with the approval of the board and the account was set up in the B. M. Behrends Bank at the disposal of the purser. (R. 352-3.) The account was labeled "Chilkoot Ferry by Robert E. Coughlin", and Coughlin alone could write checks on the fund. (R. 409.) Salaries of crew members were not paid from this fund but on vouchers through the auditor's office. (R. 276-7.) Fifty-four checks were issued on the ferry fund. (Defts. Ex. C.) Coughlin was not required to furnish a bond. (R. 423-4.)

Appellees Gruening and Metcalf both said the ferry was purchased and operated as a link in the highway system. (R. 217, 337.) Appellee Gruening said the ferry account was established to "pay the crew promptly" (R. 199), although he said he knew nothing about the operation of the ferry account. (R. 199.) Mr. Roden said "Coughlin was our agent who could draw on those funds. (R. 409.) Aliens were employed and paid out of the ferry fund in violation of section 11-1-4, A.C.L.A. 1949. (R. 290.)

Three reports or audits were received in evidence showing shortages in the ferry funds and showing the manner in which the funds were handled. (Defendant's Exhibits C and E, not printed.) The court said these reports were not material (R. 105, 608) and the court rejected the testimony of Steve Homer, agent of the ferry at Haines, whose testimony was offered to show the details of the handling of the funds and of the shortage. (R. 611.)

The ferry fund account was closed at the bank by Auditor Moore and Assistant Attorney General John Dimond on August 20, 1952. After this bank account was ordered discontinued by Moore and Diomand, *the purser handled the funds in cash.* (Testimony of Metcalf, R. 391.) Appellee Gruening said the special fund was set up to pay the crew promptly, although the crew was not paid from this fund. He said the fund was set up because it was "*expedient and convenient.*" (R. 218.)

Metcalf said the ferry was part of the road system but he could not use the motor fuel fund in its operation because that fund was for roads, harbors and harbor facilities. (R. 337-8.)

Roden said the Attorney General approved the method of handling the ferry fund in an opinion. (R. 422-3.) Neither the Attorney General nor the opinion appeared at the trial and it was the Assistant Attorney General who said the fund was illegal and he went to the bank with the auditor to close the account. (R. 282.)

Although Mr. Steve Homer, the agent of the ferry at Haines, had told Mr. Daum, the Empire reporter who wrote the articles complained of, that there was something wrong with this ferry fund and suggested that he see the auditor about it (R. 460-1), the appellant did not know at the time the articles complained of were published of the shortages in the fund. That was discovered later.

I.

IT WAS ERROR TO RULE AND TO INSTRUCT THE JURY THAT THE PUBLISHED ARTICLES WERE LIBELOUS PER SE.

We find the following in the court's instructions:

“You are further instructed that any such publication which imputes to the person referred to the commission of a crime is libelous per se, that is, a libel in and by itself; and where the matter published is libelous per se, the law presumes that it was published maliciously and that damage resulted. It is also the law that it is libelous per se to falsely impute to a person in his capacity as a public officer, fraud or dishonesty in the conduct of his official duties; and any libel affecting him in his official capacity and of such nature that, if true, would be cause for his removal from office, is actionable per se.” (R. 97.)

The court does not say it is libelous per se to *falsely impute the commission of a crime*. It is true that in the language that immediately follows the first sentence above quoted the court says: “It is also the law that it is libelous per se to *falsely impute to a person in his capacity as a public officer . . .*” However, this sentence does not qualify or contradict the first portion of the instruction set forth above, but even if it did, the court goes on to say again in Instruction No. 6 (R. 104-5):

“You are further instructed that if you should find from the evidence that the publication complained of charged or imputed to the plaintiffs the crime of embezzlement of public funds, the defendant must show, to justify the truth of such publication, not only that plaintiffs took the funds

accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, *but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.* In this connection, you should consider whether or not the plaintiffs handled such funds in good faith, and in the justifiable belief that they had the legal right to do so, without any intent to embezzle such funds or deprive the Territory thereof.”

The admitted facts, supra, was the setting up of the ferry fund and the method of handling public moneys. It then became a question of law for the court, and if the court had applied sections 12-2-1 and 65-5-63 A.C.L.A. 1949 to the facts already presented to the jury, this instruction was erroneous and the appellant’s motion for a directed verdict should have been granted. This motion had already been presented, argued with supporting authorities, but denied by the court. (R. 55-57.)

The instructions as a whole are confusing to say the least, and the court instructed the jury that they were to “consider these instructions as a whole”. (Instruction No. 15, R. 115.)

The court’s holding that the publications were libelous per se is further shown in that part of Instruction No. 5 (R. 102-3) which reads:

“Sections 11-3-8, 12-2-1 and 12-3-1, Compiled Laws of Alaska, referred to in the published letter

from Auditor Neil F. Moore to the Attorney General, being a part of Exhibit #1, provide for payment of salaries and expenses of all officers and boards out of appropriations for that purpose, for payment of all fees, licenses, taxes or other money belonging to the Territory to the Treasurer, to be credited by him to the general fund, and for disbursement of public moneys by any disbursing officer of the Territory only upon vouchers certified by the head of the department, which are then referred to the Territorial Auditor for payment. Section 12-2-1 above was repealed by Chap. 133 SLA 1951, known as the 'Reorganization Act' which Act, however, contains substantially the same requirements. *No penalty is provided for violation of any of these provisions of law;* but Section 12-3-3, CLA, provides that the officer or employee approving or certifying a voucher shall be held accountable for and required to make good to the Territory the amount of any illegal, improper, or incorrect payment prohibited by law or which did not represent a legal obligation of the Territory, which liability may be enforced by civil action."

The error of the court in this respect consisted also in refusing to give Defendant's Proposed Instruction No. 6 (R. 65), and particularly the first paragraph thereof which reads:

"You are instructed that there can be no dispute about the facts published with reference to a setting up of the special ferry fund and of the receipts and disbursement of moneys in connection with the "Chilkoot" or Haines Ferry. This was done on the express authority of plaintiffs

acting as the Board of Road Commissioners for Alaska. I instruct you that this was a violation of the laws of Alaska."

For a published article to be libelous per se, it must be susceptible of but one meaning. Judge Yankwich in his book entitled "*It's Libel or Contempt If You Print it*" illustrates this principle of the law by reference on page 137 to the case of *Woolstrom v. Montana Free Press* (1931), found in 2 Pac.2d 1020, where the Supreme Court of Montana said:

"It is well settled law that the words used in the alleged libelous article must be susceptible of one meaning to constitute libel per se and that the libelous matter may not be segregated from other parts and considered alone."

In the case before the court, appellees in their pleadings and testimony claimed that the article imputed to them the crime of theft or conversion of public funds to their own use. (R. 6-11-16 and testimony of appellee Gruening, R. 158-161.) However, in the publication the parallel drawn to the Oscar Olson case was always stated to be "*in the matter of the receipt and disbursement of public funds*" and nothing more. It is true that both Oscar Olson and the appellees had set up private bank accounts of public funds. All this was in violation of the statutes. The same punishment was prescribed in both cases under the same law, section 65-5-63. This parallel was explained by Neil Moore, the auditor (R. 295-299), and it was also explained by him in his letter to the Attorney General published in Plaintiffs' Exhibit 1, not printed. There

was no charge in the published articles that anyone had converted funds to his own use. We discovered afterward that the agent who was wrongfully and illegally appointed by the appellees had apparently done so.

Many of the principles contained in our proposed instructions are stated to be the law of libel in the case of *Berg v. Printers' Ink Pub. Co.*, 54 F. Supp. 795 (D.C., N.D., N.Y.), affirmed in 141 Fed.2d 1022. The court said in that case (page 796) :

"It is not the purpose of innuendo to graft a meaning upon or to enlarge the matter set forth, but merely to explain the application of the words used; and it must not put upon the words used a construction broader than they will bear."

See also :

Brewer v. Hearst Pub. Co., 183 Fed.2d 846, 850.

The words in the publications under discussion here are plain and unambiguous, and under the admitted facts and the application of law to those facts, there could be no libel per se.

This section of the argument covers Point No. I supra and specifications of errors numbers 5, 9, 10 and 13. (R. 692, 700, 701.)

II.

IT WAS ERROR FOR THE COURT TO RULE AND INSTRUCT THAT UNLESS IT WAS SHOWN THE APPELLEES ACTUALLY CONVERTED TERRITORIAL FUNDS TO THEIR OWN USE, THEY HAD COMMITTED NO CRIME AND NO OFFENSE INVOLVING CRIMINAL PUNISHMENT.

The court ruled and instructed the jury that in order to constitute a defense, the defendant must prove that the appellees actually converted territorial funds to their own use, and the court further denied proposed instructions that to constitute a violation of section 65-5-63, A.C.L.A. 1949, it need only be shown that the plaintiffs had not complied with the Statutes of Alaska which provided that all public funds coming into the hands of any person must be turned over to the Territorial Treasurer and converted into the general fund within the time specified in the statutes, and that if this were not done, or if the funds were loaned, that was sufficient to constitute a violation of the statute.

In this connection we again call the court's attention to that portion of Instruction No. 5 quoted hereinabove in the first subdivision of this argument. (R. 102-3.)

The court further instructed the jury in Instruction No. 5 as follows. (R. 103-4) :

"Under the law any taxpayer would also have the right to enjoin any illegal receipt or disbursement of public funds prohibited by these statutes, or to compel any public official to comply therewith, but such does not make any such violation or failure to comply with such statutes a crime,

that is, punishable by fine or imprisonment, or removal or disqualification from office.

By this the Court does not intend to comment in any way as to whether or not the actions of the plaintiffs relating to the 'Chilkoot' ferry fund were or were not illegal, which is a matter for the jury; but it is the intention of this instruction only to declare to you the remedy in case there may exist any such illegality.

You are therefore instructed that unless you find from the evidence that the facts reported in the news articles were sufficient to constitute the crime of embezzlement as above defined, no defense as to the justification of truth of the alleged libelous publication, which imputes the commission of a crime or criminal liability, may be based upon the construction of these statutes."

Again in Instruction 6 (R. 104-5) set forth in full hereinabove in the first division of this argument, the court instructed the jury that

"... the defendant must show, to justify the truth of such publication, not only that plaintiffs took the funds accruing from the operation of the ferry, deposited them in a separate account, and paid operating expenses out of such account without vouchers approved by the Auditor, *but defendant must also show by a preponderance of the evidence that plaintiffs handled the money wrongfully and fraudulently and with a criminal intent to convert such to their own use.*"

In this connection the court also erred in refusing to give Defendant's Proposed Instruction No. 7 and in holding as follows (R. 666):

"Instruction No. 7 is denied because I can not find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated in the ruling upon defendant's motion, the deposit of moneys in a bank account does not constitute a loan in violation of that statute. The court will instruct the jury instead that as far as the statutes concern embezzlement, that there is no parallel of fact in this publication. We will instruct the jury that as to any issue of the device claimed by Mr. Moore and other witnesses that that is presented although it is very difficult to prepare an instruction which will not be inconsistent upon that point. I will certainly try."

Again (R. 665) the court said:

"The request that we instruct the jury that the actions of the plaintiffs, the Board of Road Commissioners, was a violation of these laws will be denied. That question is ~~for~~ ^{not} the court to determine."

This was in his refusal to give our Defendant's Instruction No. 6.

As we have said, the charge in the alleged libelous publications was that appellees had violated the law "*in the matter of receipt and disbursement of public funds.*" Nothing could be plainer than the fact that this is a crime under the provisions of section 65-5-63, A.C.L.A. 1949.

The laws of Alaska are not unlike many of the statutes of the United States and of the various states

when it comes to legislating for the protection of the public. The Alaska statutes define the crime of embezzlement not necessarily or solely as a conversion of funds of another to one's own use, but they make it the crime of embezzlement for public officials or persons having charge of public funds to handle them contrary to the manner prescribed by law. In cases under such statutes as referred to, it has been held over and over again that an actual theft of the money or conversion to one's own use is not necessary.

A case very much in point and we think almost exactly like the case before the court is the case of *Dimmick v. United States*, 121 Fed. 638 (9th Cir.). In that case the court sustained the conviction of an employee of a mint for failing to make deposit of public funds as the law and regulations required. Dimmick was an employee of the mint at San Francisco, and certain funds came into his hands during the December quarter. He was indicted under R. S. section 5492 which reads:

“Every person who, having moneys of the United States in his hands or possession, fails to make deposit of the same with the treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the treasury, shall be deemed guilty of embezzlement thereof, and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money embezzled.”

The regulations of the Treasury Department required that all such funds must be deposited on or before the end of the quarter in which received. Dimmick had received funds in the December quarter, and had not deposited them as the regulations directed before the end of that quarter. He did deposit the funds in the March quarter. He was indicted first for stealing the funds (on which indictment he was acquitted), and on two additional counts for violation of this statute, that is to say, for not paying over the money. He was convicted and he appealed to this court. The conviction was affirmed. The court said:

“It is true that by the language of section 5492, Rev. St. (U.S. Comp. St. 1901, p. 3705), it is declared that one who fails to comply with the requirement which directs him to deposit moneys of the United States shall be deemed guilty of embezzlement, but the offense consists, not in the imputed embezzlement of the money, but in the failure to comply with the direction to deposit. The offense may be complete without any actual embezzlement of money. It is committed when it is shown that there is a willful and felonious failure to comply with the specified requirements of the Secretary of the Treasury or the head of the proper department.”

The case of *United States v. Balint*, 258 U.S. 250, was a case involving the anti-Narcotics Act. There the Supreme Court said (p. 252):

“It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered

and overruled in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide ‘that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.’”

This case was followed by *United States v. Dotterweich*, 320 U.S. 277, which dealt with a violation of the Pure Food and Drug Act. There it is said (p. 281) :

“Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”

Again in *United States v. Behrman*, 258 U.S. 280, 288, the Supreme Court said:

“If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.”

See also *United States v. Parfait Powder Puff Co.*, 163 Fed.2d 1008 (7 Cir.), which deals with the shipment of cosmetics in interstate commerce, and *People v. Stuart*, decided in April, 1956, by the District Court of Appeal, and found in 140 A.C.A. (Cal.App.2d), page 390.

Also

U. S. v. Kocmond, 200 Fed.2d 370, 374 (7th Cir. 1952).

This section of the argument covers our Points II and III, supra, and deals with Specifications of Error Nos. 4, 5, 10, 18, 20 and 21. (R. 698-700, 702-3.)

III.

THE COURT ERRED IN HOLDING AND INSTRUCTING THE JURY THAT UNDER THE STATUTES OF ALASKA THE APPELLEES WOULD NOT BE CRIMINALLY LIABLE FOR ILLEGAL ACTS OF THEIR AGENT.

The court gave Instruction No. 6 (R. 104-5) which is set forth in full in subdivision 1 of this argument, to which reference is made. In this instruction the court said that the defendant must show, in order to justify the truth of the publication, that plaintiffs handled the money wrongfully and fraudulently *with a criminal intent to convert it to their own use*. We respectfully request that the court read the whole of this instruction, which, as we say, is set forth hereinabove.

The court refused to give Defendants' Proposed Instruction No. 27 (R. 88-9), which reads:

"It is admitted that plaintiffs, as Board of Road Commissioners, authorized the handling of the ferry funds in the manner described in the publication complained of. They constituted Robert Coughlin, the purser of the ferry boat 'Chilkoot' their agent to receive these funds and to disburse them by check without any counter-signature. Therefore, Coughlin became the agent of the plaintiffs and his acts in the receipt, disbursement and handling of the ferry funds were the acts of plaintiffs.

If an agent is appointed to perform an illegal act and he does so, the one appointing him is responsible criminally and if a tort is committed, he is civilly liable. Restatement: Agency, Vol. 1, section 19.

The possession of the ferry funds by Coughlin was the possession by plaintiffs. The disbursement of the funds by Coughlin was the same as if it had actually been done personally by plaintiffs. The loss of any portion of the funds would therefore be attributable to plaintiffs."

It was not necessary that plaintiffs have actual possession of the funds. In *Garner v. State*, 158 So. 546, Appellant Garner was convicted of embezzlement of public funds, not in his possession.

The Supreme Court of Alabama said in that case:

"Under our statutes, 'embezzlement' includes statutory offenses which do not embrace all the elements of the English offense of embezzlement. The acts made a crime by section 3961, Code, omit some of the essentials of that crime, but the statute declares that such conduct is embezzlement. So that to sustain a conviction on a charge of embezzlement under that Code section, it is not necessary that all the elements of the offense as it existed under the early English act (*Knight v. State*, 152 Ala. 56, 44 So. 585) be proven or charged, if the acts declared by the statute are proved and charged. And a general charge of embezzlement may be proven by such statutory requirements. *McGilvray v. State*, 228 Ala. 553, 154 So. 601.

We cannot agree with petitioner therefore that an indictment under section 3961, Code, must aver

possession of the funds by defendant or a fraudulent intent. *Ex parte Cowart*, 201 Ala. 525, 78 So. 879.

As we understand the facts stated in the opinion of the Court of Appeals, they are, in substance, so far as here necessary to recite them, that the \$75 a month was paid appellant, who was one of the city commissioners, for services rendered the city, to perform which he had not been, and could not be, legally employed by the city commission. But he was paid on warrant issued by the city clerk and approved by the mayor, but not authorized by the city commission, and, further, that this could not be legally done by the commission. The theory of the opinion is that no such disbursements are authorized by law; that appellant knew that fact; that the funds were under the control of the city commission of which he was a member, and that, therefore, he was wrongfully converting to his own use city funds which were under his control jointly with other commissioners; that this was wrongful because not authorized by the commission, and prohibited by law. Sections 1891 and 1910, Code."

In *People v. Knott*, 104 Pac. 2d 33, there is the following language of the Supreme Court of California:

"Although the County treasurer is charged with the receipt and disbursment of County money (Sec. 4901 Pol. Code), such funds, at least to a limited extent, are within the control of the auditor. One who is not in possession of money may have it under his control in the sense that it is under his direction and management. * * *"

In that case a County auditor was convicted of embezzling money not in her possession.

"One who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally, for failure of the person to whom he has delegated the obligation to comply with the law, if the non-performance of such duty is a crime."

U. S. v. Parfait Powder Puff Co., 163 Fed. 2nd. 1008 (7th Cir. 1947.)

Appellees, throughout their testimony, professed to know little about the details of the "ferry fund", but the following testimony of appellee, Roden, in answer to questions of Mr. Nesbitt, his counsel, is interesting:

"Q. Mr. Roden, as a member of the Territorial Board of Road Commissioners, were you ever informed that there was any shortage in the moneys handled by Robert E. Coughlin?

A. Well there was a report came out at one time and I talked that over somewhat with the Attorney General in the most casual manner. I was never called about it at all or advised of anything definite * * *

Q. Did you know that any shortage purportedly or might have existed?

A. I was positive there was no shortage." (R. 419.)

Appellant made an offer of proof of loss of funds through the acts of the appellees' agent Coughlin. This was done while the witness Steve Homer was on the stand. (R. 606-616.) This offer was rejected. In making that offer, the following occurred while the witness Homer was on the stand. (R. 610.):

"Mr. Faulkner. I further offer—I state this because—I might as well state it now—I further offer to prove by Mr. Homer that there were illegal payments made out of this fund; that there was payment to aliens, which is contrary to the Territorial law; that there were advances claimed to have been made in wages which were not made; and that there was a very considerable loss of public funds; and their connection with the plaintiffs is that they expressly authorized the handling of the funds by Mr. Coughlin and that they are responsible for his acts. Mr. Roden stated, and as the proof shows, he was their agent.

The Court. That may be permissible except for this fundamental fact, counsel, and that is this publication charges these plaintiffs with commission of a crime, and that we cannot deny. Even if what you say is true, there would be no criminal liability of the members of the Board for such acts unless it be shown that they were accessories to it, and there is no such charge in the publication. We cannot go into something which is wholly collateral. There is no action against plaintiffs for diversion of funds.

Mr. Faulkner. They brought the action themselves on the article which refers to diversion of funds, diversion of funds out of the normal channel provided by law into an unauthorized person's hands who lost the funds."

Aside from the fact that the appellees themselves were criminally liable under sections 12-2-1 and 65-5-63 A.C.L.A. 1949, for setting up the special ferry fund and in not placing the receipts in the general fund of the treasury, they would certainly be also criminally

liable for the loss of the funds under the circumstances, through their agent. This phase of the case might not seem to be important because the law makes it an offense for any person having possession of public funds not to pay them into the general fund, and that alone should be sufficient, but since appellees read into the publications of the appellant that the appellant was charging the appellees with actual theft or misappropriation of the funds, we made every effort to show that there was an actual loss and embezzlement of public money through the agent and that this as a matter of law should be attributable to the appellees.

“One may not properly appoint an agent to commit a criminal or otherwise illegal act, but the appointment is ordinarily not wholly ineffective. If the one directed to perform the act does the act directed, the person directing him may be responsible criminally, and if a tort is committed, civilly.”

Restatement. Agency, section 19.

Section 65-3-2 A.C.L.A. 1949 reads:

“All persons *concerned* in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the crime or aid or abet in its commission, though not present, are principals and to be tried and punished as such.”

A case which we think is squarely in point here under this statute is *Rosencranz v. United States*, 155 Fed. 38 (9 Cir.).

“One who owes a certain duty to the public and entrusts its performance to another, whether it

be an independent contractor or agent, becomes responsible criminally for failure of the person to whom he has delegated the obligation, to comply with the law, if the nonperformance of such duty is a crime."

United States v. Parfait Powder Puff Co., 163 Fed.2d 1008 (7 Cir.) supra.

See also *United States v. Balint*, supra; *United States v. Dotterweich*, supra, and *United States v. Wilson*, 59 Fed. 2d 97.

These matters were all presented to the trial court on defendant's motion for an instructed verdict, argued at length with authorities, but the motion was denied. (R. 55-6-7.)

This section covers Points III, IV and VII set forth hereinabove and Specifications of Error Nos. 2, 3, 10, and in part 18, 20 and 21. (R. 698, 700, 702-3.)

IV.

THE COURT WAS WRONG IN STATING AND INSTRUCTING THE JURY THAT THE LAW PRESUMES THE PUBLICATION TO BE MALICIOUS.

The court rejected Defendant's Proposed Instruction No. 16 and that portion which reads as follows:

"... In this connection you are instructed that the burden of proving malice is on the plaintiffs. The defendant is not required to prove absence of malice (*Curtis Publishing Co. v. Frasier*, 209 Fed.2d 1). You will see moreover that the burden is on the plaintiffs to prove by a preponder-

ance of evidence to your satisfaction the material allegations of the complaints before they are entitled to recover anything from the defendant. Malice has been described as follows:

‘The malice which avoids the privilege is actual or express malice, existing as a fact, at the time of the communication, and which inspired or colored it. Such malice exists where one casts an imputation which he does not believe to be true, or where the communication is actuated by some sinister or corrupt motive or motives of personal spite or ill will or where the communication is made with such gross indifference to the rights of others as will amount to a willful or wanton act. (*International & G.N.R. Co. v. Edmonston*, 222 S.W. 185; *Jones v. Associated Aviation Underwriters*, 203 Fed.2d 208.)

In this connection you are instructed that there is no allegation in the complaints that the defendant did not believe the statements published to be true.

The law raises a presumption of good faith on the part of defendant and even negligence on the part of defendant can not take the place of malice. There is neither allegation nor proof that the defendant did not believe the statements which it published to be true, and in the absence of such allegation and proof, no malice can arise in this cause.” (R. 78-9.)

We have no law in Alaska covering civil actions for libel. This court in the case of *Golden North Airways v. Tanana Publishing Co.*, 218 Fed.2d 612, at page 623, says that “we may adopt the definition of

the common law which declares libelous every *false and unprivileged* publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided or which tends to injure him in his occupation." There is no malice in law in the State of California.

The record shows that all the appellees were holding public office, two of which were elective and one appointive. One appellee, Metcalf, was at the time of the publication a candidate for reelection to the office of Highway Engineer. In *One* of the leading cases on libel, which is referred to by this court in *Golden North Airways v. Tanana Publishing Co.*, supra, is *Coleman v. McLennan*, 98 Pac. 281. There is in that case a lengthy and interesting discussion of malice. The court approved an instruction to the jury which read as follows:

"A communication made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. And, where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office, and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith, and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff,

and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

It may be argued that appellee Gruening introduced considerably testimony and a number of exhibits in order to establish malice toward him on the part of the publisher of the Empire, and it may well be said that there was a conflict in this respect. The publisher, Mrs. Munson, strenuously denied that she was actuated by any malice or ill will, but that her course of conduct in publishing the paper was in the interest of ^{the} territory and there was nothing personal in her actions. This, of course, would be a question for the jury, unless the published article contained facts which were true, as we contend this one did. However, there was no testimony regarding any ill will or malice on the part of the defendant toward either of the plaintiffs, Roden or Metcalf.

Perhaps the argument on this point is superfluous because we think the publication contained the truth and that the comment constituted fair comment and privilege, and under those circumstances the question of malice would be immaterial.

This section covers Point No. V and Specifications of Error Nos. 5 and part of 18. (R. 699, 702.)

V.

IT WAS ERROR TO HOLD, RULE, AND INSTRUCT THE JURY THAT TRUTH IS NOT A DEFENSE UNLESS KNOWN AT THE TIME.

This section deals with the additional defense that not only was there a violation of law in setting up and disbursement of public funds, but that the illegally appointed agent of appellees embezzled or lost a substantial portion of them.

The court gave Instruction No. 7 (R. 105) as follows:

“During the trial of this case considerable testimony has been received concerning the question of whether or not a shortage of money occurred in the handling of moneys in connection with the operation of the ferry ‘Chilkoot’ by the purser.

You are instructed to disregard all of such testimony as it is not relevant to the issues involved. No shortage of moneys in the ferry operating fund is mentioned in the publication of the Daily Alaska Empire of September 25, 1952, and the question of whether or not such a shortage occurred is not made an issue in this case by the pleadings of either the plaintiffs or defendant, or is relevant to the question of the truth or falsity of the publication.”

The court refused to give the last paragraph of Instruction No. 6 (R. 64-5) requested by defendant, which reads:

“It is also undisputed that the certified public accountants and auditors who audited the books and accounts of the territory, its boards, agencies

and officials for the years 1951-2, found discrepancies in the special ferry fund account and a shortage of \$300.58, and that they also found that the accounts had not been accurately kept, but kept in such manner that it was impossible to ascertain from any source the exact status of the ferry funds.”

and defendant's proposed Instruction No. 22 (R. 85) which reads:

“You are instructed that in all libel cases, the truth of facts published is a complete defense. Motive and purpose are immaterial. If the charges are true, it doesn't matter whether defendant knew at the time the facts were published they were true, but discovered that afterward, for the truth whenever discovered is a complete defense.

Yankwich, ‘*It's Libel or Contempt If You Print It'* pp. 359-60.”

The shortage in the ferry accounts was pleaded by defendant in its answers to the amended complaints (R. 21, 41, 49.)

The court's position on this is also found in his ruling on defendant's offer of proof while the witness Homer was on the stand. (R. 607-611.) The following occurred:

“Mr. Faulkner. Just a minute, your Honor. I haven't finished, Then we propose to introduce some other checks that did not get into the special ferry account, didn't get into the public funds at all. I want to show the method, the endorsements on them, and they are issued by Mr. Homer.

The Court. Do you propose to show anyone connected with the Juneau Empire knew anything about it?

Mr. Faulkner. No. I don't think I have to.

The Court. I think you have to.

Mr. Kay. Do you intend to show one penny did not eventually go into Territorial possession?

Mr. Faulkner. I do.

Mr. Kay. How?

Mr. Faulkner. By showing—

Mr. Kay. Let's say he issued a check to Bobby Coughlin and it was cashed at a grocery store. Does that demonstrate what was done? No; not one iota.

Mr. Faulkner. Coupled with Mr. Ehrendreich's audit—

Mr. Kay. It shows it was accounted for.

Mr. Faulkner. No, it doesn't.

The Court. I cannot see where *either the audit* or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here.

Mr. Faulkner. It is the very heart of the case, your Honor.

The Court. There is no allegation or charge in the publication regarding any shortage that I am able to find. The charge is that these men wrongfully or illegally disbursed funds without putting them through the treasury. Anything that Coughlin did with regard to the money *or this audit is wholly irrelevant.*

Mr. Faulkner. I would have to take exception to that because it is the heart of the case.

The Court. It has nothing to do with the case as far as I can see.

Mr. Kay. Nothing.

Mr. Faulkner. I will make a further statement. This connection of the plaintiffs with public funds—

The Court. Well—

Mr. Faulkner. A statement for the record. The purpose is to show that the plaintiffs entrusted public funds to an unauthorized person without a bond and that a considerable portion of those funds was lost to the Territory.

The Court. We are not trying these parties either on any civil or criminal action for unlawful—well—or for failure to account for these funds. The issue here is solely whether this publication is true or false, and this evidence can have no possible bearing on it because nothing is suggested in the editorials or articles regarding a shortage of funds. There is no such charge.

Mr. Faulkner. My understanding of the law from the Restatement of the Law, which I can cite to your Honor, is that, where an official or anyone else entrusts funds illegally, unlawfully, to another person and where they are lost and embezzled, he is criminally and civilly liable.

Mr. Nesbett. That has no bearing on the issues raised in the pleadings.

The Court. Precisely.

Mr. Faulkner. But—

The Court. In any event, it has no bearing on this case, no bearing whatever. We must confine the issues to the publication, whether it is true or false. That is all we are concerned with.”

Then again in this offer of proof we find (R. 611-12) :

"The Court. There is nothing whatever in the published publication inferring or in any way mentioning any loss of funds.

Mr. Kay. That is right.

The Court. Therefore, it is not in issue in this case.

Mr. Faulkner. That is true, but the law is that the truth of the facts whenever and wherever discovered are admissible as a defense.

The Court. Such issue would have no relation to the truth or falsity of the libel—nothing.

Mr. Faulkner. Well, I don't think I can ask Mr. Homer any questions under the ruling of the Court, and, again, I would have to except to your Honor's ruling."

The record shows that the counsel and court reporter withdrew from the bench and were again within the hearing of the jury and the trial proceeded as follows:

The Court. The objection of the plaintiff to the last question to the witness Homer will be sustained and the offer of proof made by counsel is denied on the grounds that it is not relevant to the issues in this case.

Mr. Faulkner. I just wonder if in connection with the offer, I shouldn't offer the exhibits I was going to offer through Mr. Homer.

The Court. If you wish.

Mr. Faulkner. I think perhaps I better have the reporter come up——

The Court. Well, that could make no difference. You may offer them. It would not be necessary to identify them. Your offer is denied for the reasons stated because it would be irrelevant,

so, whether it is sufficiently identified or not, it makes no difference because they are irrelevant.

Mr. Faulkner. I think I stated in the objection—I mean, in the offer—what we intended to prove by these checks.

The Court. Yes; that is understood.

Mr. Faulkner. If that is understood, it is all right."

The report of Arthur Anderson Company, the official auditors, shows a shortage of \$300.26, and that it was impossible to ascertain from any source the exact status of the fund because of the manner in which the books and accounts had been kept. (Defendant's Exhibit E, not printed.) Ehrendreich, the auditor employed by appellees, made two reports on the same day, October 10, 1952, after the suits were filed. (Defendant's Exhibit C, not printed.) One report says:

"We were unable to verify the \$4106.07 alleged to have been paid for advances; however, we have no reason to doubt that they had actually been paid as claimed."

Three checks of \$100.00 each were issued to Coughlin as *advances*, and there was nothing on record to substantiate repayment, and two checks issued to Steve Homer as a "*personal loan*" with nothing to substantiate repayment except Coughlin's word. This report also shows: "Salaries and advances to crew, \$1595.65". The claimed "Salaries and advances to crew" seems rather puzzling in the face of the fact that all salaries were paid through the Auditor's Office in the regular manner and none from the special ferry fund. (R. 276-8.)

The other report of Mr. Ehrendreich of October 10, 1952, contains no mention of discrepancies or shortages, and it may be significant that it is labeled “*Short Statement for Publication*”.

Mr. Homer, who was employed on the ferry “Chilkoot” and also as the Haines agent, was sworn as a witness, and he offered to explain these shortages by reference to the Ehrendreich reports and in explanation of some of the items in this very strange and unusual audit, but the court said (R. 608) :

“I cannot see where *either the audit* or this offer of proof has any bearing upon the truth or falsity of this alleged libel, and that is the issue we are trying here.”

and the offer of proof was denied, *supra*. The cancelled checks of Homer which we offered to explain shortages were also ruled immaterial and rejected by the court as irrelevant. (R. 611-12.)

If the parallel to the *Olson* case “*in the matter of receipt and disbursements of public funds*” was not complete, under the trial court’s theory, unless there could be shown an actual misappropriation of funds, we offered the evidence to show such misappropriation by appellees’ illegally appointed agent and the consequent loss of public funds.

In Judge Yankwich’s “*It’s Libel or Contempt If You Print It*”, we find this at page 358:

“(2) *The Law Today*. At the present time the truth is a complete defense to an action for civil libel. It is not necessary to dwell at length upon the justice of this rule.”

Then he quotes some of the language from a decision of the Supreme Court of Kansas, *Castle v. Houston*, 19 Kan. 417, as follows:

“... On general principles no right to damages can be founded on a publication of the truth from the consideration that the reason for awarding damages is every such case fails. The right to compensation in point of material justice is founded upon deception and fraud which have been produced by defendant to the detriment of plaintiff. If the imputation is true, there is no deception or fraud and no right to compensation.”

Many other authorities are also cited by Judge Yankwich in this connection. And again he says at pages 359-60 :

“Nor does it matter that the defendant did not believe the charges to be true when he made them and only discovered their truth afterward. The important thing is that they be in fact true and the truth whenever discovered is a complete defense.” (Citing other cases.)

The rule is set forth in *Restatement: Law of Torts*, section 582, comment (g) :

“While the truth of a defamatory publication is a complete defense under the rules stated in this section, a mistaken belief in the truth of the matter published, although honest and reasonable, is not a defense unless it is published on a privileged occasion. *On the other hand if the defamatory matter is true, it is immaterial that the person who publishes it believes it to be false; it is enough that it turns out to be true.*”

This section of the argument covers Points VI and VII, supra, and specifications of error Nos. 2, 10, 11, 15, 16, part of 18, and 20 and 21. (R. 698, 700, 702, 703.)

VI.

IT WAS ERROR TO SUBMIT TO THE JURY FOR ITS CONSIDERATION HEADLINE ENTITLED "REEVE RAPS GRAFT, CORRUPTION".

This headline did not have the remotest connection with any one of the appellees; nor did the news story of which it was the caption. Appellees complained of it because a copy of a ferry account check was published beneath a portion of the headline. All these appeared in Plaintiffs' Exhibit A, not printed. All that it is necessary to do to see the irrelevance^{cry} of this headline is to read it and examine the article which it heads.

Appellant requested the court in its motion for a directed verdict to disregard this headline and the Reeve article, and when this was denied Instruction No. 5 was requested by defendant (R. 62) :

"You are instructed that you are to disregard the article complained of which bore the headline 'Reeve Raps Graft, Corruption'. It has not been shown that this article even remotely refers to any one of the plaintiffs. Furthermore, that appears from reading the article. It has no connection with anything else which appears in the Empire on September 25, 1952, and therefore should have no place in your deliberations."

This instruction was denied. (R. 655.)

It seems to be well settled in the law of libel that a word, phrase or headline may not be considered alone. There is an abundance of authority on this, and we shall cite only one which we cited to the trial court in the motion for dismissal or instructed verdict, and that is the case of *Rose v. Indianapolis Newspapers, Inc.*, 213 Fed.2d 227 (7th Cir.). This case dealt with a headline and the court said:

“The fallacy in plaintiff’s argument is that it conflicts with this cardinal rule of the law of libel, which ‘flatly prohibits’ any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts. We conclude, therefore, from a consideration, of the whole of the publication, that there is nothing to justify a finding or an inference that the reporter exceeded a substantially true statement of the facts. The essential truth of a news report is always a defense to an action for libel.” (Citing authorities.)

This section covers Point No. VIII, *supra*, and specification 19. (R. 702-3.)

VII.

IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY TO TAKE INTO CONSIDERATION THE LOSS OF THE CANCELLED CHECKS ON THE FERRY FUND.

Defendant requested the court to give the jury its proposed instruction No. 18 (R. 80-85), the first three paragraphs of which read as follows:

“A witness wilfully false in one part of his testimony may be distrusted in other parts.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

In this connection you are instructed that the plaintiffs have not produced here the records of the Chilkoot Ferry fund transactions. These records should be in the office of the Highway Engineer and all documents, checks, bank statements, and other instruments and papers in writing concerning the bank account which is mentioned in the pleadings herein should be on file in either the office of the Territorial Treasurer or the office of the Highway Engineer. The certificates of these officials and of the Commissioner of Finance, who succeeded to the office of Auditor, have been introduced in evidence showing that no canceled checks are in either of their offices. It was the duty of the plaintiffs to have seen that these checks, other instruments and bank statements were filed in the proper office and you are instructed that if

any person having custody of any public record, book, paper or writing shall wilfully destroy, secrete or mutilate the same, he is guilty of a crime and liable to punishment under the provisions of Section 65-7-21, ACLA 1949.

The plaintiffs were all Territorial officials at the time these records were made and at the time the checks were issued, and it was their duty to produce the records before you or to explain why they were not produced and what disposition was made of them. . . .”

The court gave the first two paragraphs of this instruction, but refused the third paragraph and all that followed. (R. 80, 85.) This part of the proposed instruction dealt with the cancelled checks issued on the “Chilkoot Ferry” account in the Behrends Bank. Defendant had demanded in writing that plaintiffs produce them in court. (R. 404.) Then defendant introduced certificates of the present Highway Engineer, Treasurer and Finance Commissioner to show that none of these checks was in their offices. (Defendant’s Exhibits F, G and H.) It also introduced the testimony of Mrs. Minnie Coughlin (R. 602), widow of Robert E. Coughlin and executrix of his estate, who stated that she had searched deceased’s effects and papers, but could find no checks.

All the appellees remained in their respective offices for more than six months after this suit was filed. No effort was made to preserve them or photostat copies of them. They just mysteriously disappeared. Metcalf, the Highway Engineer, in whose office they

should have been filed, said he did not look for them and did not know where they were. (R. 385.)

These checks would have been of extreme importance, for an inspection of them would have enabled the court and jury to see just where the ferry funds went, how they were expended, for what purpose, and the amount of the loss.

The court held the cancelled checks were immaterial and inadmissible, thereby holding in effect that no matter what they would have disclosed it would have made no difference. We think the court should have given paragraph 3 of defendant's proposed Instruction No. 18, and have permitted defendant's counsel to comment to the jury on the disappearance of these checks and their nonproduction by plaintiffs. Defendant's attorney was denied that right by the court's ruling.

This section covers Point IX and specification of error No. 6.) (R. 699.)

VIII.

IT WAS ERROR TO HOLD THAT DEPOSIT OF MONEY IN A CHECKING ACCOUNT IN A BANK DOES NOT CONSTITUTE A LOAN.

Instruction No. 5 (R. 102) tells the jury that "the deposit of any such funds in a bank subject to be withdrawn by check does not constitute in law a loan of such funds".

Defendant Proposed Instruction No. 7 (R. 66-7) reads in part as follows:

"The law defining the crime of embezzlement covers cases where public funds are converted by defendant to his own use and also where they are not received and disbursed in accordance with the statutes of the Territory. *It also covers deposits in bank accounts of public funds without authority of law . . .*"

In refusing this instruction the court said (R. 666) :

"Instruction No. 7 is denied, because I cannot find that the law defining the crime of embezzlement covers cases where public funds are not deposited in the right account, if it is so that they were not, unless there be a conversion of those funds to the use of such person, and that, as stated under the ruling on defendant's motion, *the deposit of moneys in a bank account does not constitute a loan in violation of that statute.*"

This point is important in connection with the parallel to the *Olson* case, for he used "the same device". (R. 296-299.)

It would seem that the nature of a deposit with the bank in a checking account is well settled, and that is, it is a loan by the depositor to the bank creating the relationship of debtor and creditor.

"The deposit of money by a customer with his bank is one of loan with a super added obligation that the money is to be paid when demanded by a check."

Davis v. Elmira Sav. Bank, 161 U.S. 283, 288.

It cannot be doubted that, except under special circumstances, or where there is a statute to the

contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have the debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character."

N. Y. County Bank v. Massey, 192 U.S. 138, 145.

"Deposits with or without interest are nothing but a loan of money."

Bank v. Lanier, 78 U.S. 369, 375.

See also *Bramwell v. U. S. Fid. & Guar. Co.*, 299 Fed. 705 (9th Cir.); *Citizens Natl. Bank v. Linneberger*, 45 Fed.2d 522, 528 (4th Cir.); *City & County of S.F. v. Mackey*, 22 Fed. 602, 608; *Keller v. Frederickstown Sav. Inst.*, 10 A.L.R.2d 426.

But what about the advances to Coughlin and Homer disclosed by the Ehrendreich report (not the one labeled "for publication", but the other one); (Defendant's Exhibit C, not printed). Ehrendreich, appellees own auditor, found that there were "*advances*" of \$300.00 made to Coughlin and two checks for something over \$200.00 issued as a "*personal loan*" to Steve Homer, the repayment of which could not be substantiated by the report. Surely these constituted a loan.

Appellees authorized all this when they set up the special fund and appointed a man to handle it

without a bond and with no check on his disbursements. The whole thing was illegal, unauthorized and a violation of the statutes for the protection of the public funds. Appellees should hardly be awarded punitive damages in the sum of \$15,000 because the newspaper, in pursuance of its duty, made the matter public and commented on the facts, even though the comment may have appeared harsh, for as this court said in *Smith v. Levitt*, 227 Fed.2d 855, 858 (9th Cir.) 1955:

“Political figures are the subject of discussion. It would go far to limit that public enlightenment in regard to public personalities if the court should hold that attack and defense of such figures cannot be made in the press. He who seizes the sword may be wounded by a sword.”

And again in the recent case of *Borg v. Boas*, 231 Fed.2d 788, at 794 (9th Cir.):

“The public press performs its most valuable function in the interest of the people at large by correctly reporting proceedings which relate to the administration of law. It is vital in a country which relies upon representative officials that the public be so informed. Otherwise there is no guard against maladministration.”

This covers point X, supra, and specifications of error Nos. 14 and part of 18. (R. 701-2.)

IX.

**THE ADMISSION OF THE PURPORTED COPY OF THE FRED
McGINNIS LETTER WAS PREJUDICIAL ERROR.**

Counsel for appellees introduced in evidence over defendant's objection a purported copy of a letter from Fred McGinnis, said to have been written to the defendant. The copy was not signed. It was objected to as hearsay, as expressing the alleged writer's views on three or four different things, and incompetent and immaterial. The letter is set forth in full at R. 183-9. While the court ruled that a portion of the letter was hearsay (R. 186-7), it is in the record and went to the jury (R. 186-7), and our other objection to the introduction of the letter was overruled. (R. 186.) Appellee Gruening's introduction of this letter constituted hearsay, because he did not have the original, and the appellees did not produce the witness McGinnis. The harm consisted in our not being able to cross-examine him and learn from him whether he ever wrote such a letter, who prompted it, how much knowledge he had of the defendant, and how long he had been in the Territory. If the letter was genuine, and there is nothing to indicate that it was, the opinion at best is the opinion of one man and it is certainly not the best evidence. (Specification of Error No. 8, R. 699.)

X.

THE METCALF CASE.

In the case of Metcalf, the jury found a verdict of \$5,000 punitive damages, although he did not request

punitive damages in the prayer of his complaint. (R. 17.)

After first instructing the jury on compensatory damages, the court goes on to say in the third paragraph of Instruction No. 9 (R. 109, 110) :

“As to exemplary or punitive damages you are instructed that if you find from a preponderance of the evidence that the articles and editorial were published recklessly, wantonly, out of spite or ill will, or with utter disregard for the rights of the plaintiffs, *you may also award each of them such further sum, not exceeding the amount asked for, by way of exemplary or punititive damages as in your judgment you believe should be fairly assessed against the defendant.*”

Metcalf did not ask for any sum for punitive damages. Although he alleged malice, he simply asked for damages in the sum of \$100,000, with no separate claim for punitive as distinguished from compensatory damages.

Appellant admits that counsel for appellees asked the court at the opening of the trial for leave to amend the complaints of both Roden and Metcalf and to ask for punitive damages in both cases. They did so amend the Roden complaint, but not that of Metcalf. (R. 7, 17.) Metcalf asked just for damages. Punitive damages are in a different realm. They are said to be in the nature of punishment or a fine for the protection of society.

Newell on Slander and Libel, 4th Ed., 814, discusses punitive damages and quotes from *Holmes v. Holmes*, 64 Ill. 294, where it is stated:

"The principal grounds upon which the doctrine of exemplary damages has been assailed, is that it is a false theory, and inconsistent with the nature of the proceeding, to mix the supposed interests of society with those of an individual in the pursuit of purely private redress for a private injury, and is subject to great abuses . . ."

Newell admits, of course, that the courts had allowed punitive damages in proper cases. In the case now before the court the jury in effect punished the defendant by what amounts to a fine of \$5,000 for inflicting actual damages amounting to \$1.00 to Metcalf and under a complaint where he had not requested the \$5,000.

Rule 9(g) reads:

"When items of special damage are claimed, they shall be specifically stated."

Surely the words "special damage" within the meaning of the rule includes more than the term as applied in libel cases for pecuniary loss or injuries to business, etc.

In the case of *Burlington Transp. Co. v. Josephson*, 153 Fed.2d 372 (8th Cir., 1946), the trial court, in a case where plaintiff sued for false arrest, alleged to have been wilful, false, forcible and without right, allowed the plaintiff to testify as to injuries to his business, pecuniary damage, etc. The court then instructed that these special damages might be considered by the jury. The Court of Appeals reversed the judgment and held that general damages only were

claimed in the complaint and that nothing more could be recovered.

This section of the brief refers to specifications of error Nos. 20 and 21. (R. 703.)

XI.

FAIR COMMENT AND PRIVILEGED CRITICISM.

Since the facts regarding the diversion of public funds and the refusal and neglect of appellees to turn them over to the general fund of the Territory are undisputed, the criticism of appellees in the publication was privileged and the comment was fair comment. The court refused to instruct that "fair comment" is not libel. (R. 673-4.)

Appellant urged throughout the trial that since the essential facts were undisputed, and since the acts of appellees were a violation of the statutes of Alaska and paralleled the *Oscar Olson case in the receipt and disbursement of public funds*, the comment of appellant was fair and its criticism privileged.

It is well settled that fair comment on facts truly stated is not libel. I shall not lengthen this brief or burden the court with a list of authorities on this point.

This court considered this in the case of *Golden North Airways v. Tanana Publishing Co.*, 218 Fed. 2d 612, at 627, and said:

"At times 'fair comment' and 'privileged publications' are used synonymously. But in reality they

are not the same. For in privileged publication there would be libel but for privileged occasion—while fair comment is not libel."

Gatley on Libel and Slander, 4th Ed. 1953 p. 335 et seq.;

Restatement, Torts, Sec. 606;

Thayer, Legal Control of Press, 2d Ed. 1950, secs. 65-68;

Thayer, Fair Comment as Defense, Vol. 1950, No. 2 Wis. Law Review, p. 289;

62 *Harvard Law Review* 1207;

49 *Columbia Law Review* 875.¹⁴

The general rule of law on privileged criticism is set forth in Restatement: Law of Torts, sec. 606, p. 275, as follows:

"(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,

(a) is upon

(i) a true or privileged statement of fact,
or

(ii) upon facts otherwise known or available to the recipient as a member of the public, and

(b) represents the actual opinion of the critic,
and

(c) is not made solely for the purpose of causing harm to the other.

(2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or char-

acter affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.”

Again this court in the *Golden North Airways* case, supra, at page 628, quotes from *Howard v. Southern California Associated Newspapers*, 213 Pac.2d 399:

“Publications by which it is sought to convey pertinent information to the public in matters of public interest are permitted wide latitude. In controversies of a political nature, in particular, the circumstances often relieve statements, which might otherwise be actionable, of possible defamatory imputations. Mere expressions of opinion or severe criticism are not libelous if they clearly go only to the merits or demerits of a condition, cause or controversy which is under public scrutiny, even though they may adversely reflect upon the public activities or fitness for office of individuals who are intimately connected with the principal object of the attack.”

CONCLUSION.

In conclusion we respectfully submit that the entire record shows the facts published were true. The setting up of the special ferry fund in the manner charged in the publications was shown by admissions and the uncontroverted evidence. This act of appellees showed a violation of the law on their part. The

law prescribes the same punishment for this violation as in the *Olson* case. The parallel mentioned in the publication to the *Olson* case was "*in the receipt and disbursement of public funds*". The parallel was complete. The comment, though perhaps appearing severe to appellees, was fair comment and the criticism was absolutely privileged as held by the great weight of authorities.

As shown by the record and pointed out hereinabove, the trial court took the position throughout the trial and repeatedly ruled, and instructed the jury:

1st. That to constitute a violation of the statute involved, namely, section 65-5-63, there must be actual theft or conversion of public funds to the personal use of appellees;

2nd. That truth is not a defense in a libel suit unless it is known to defendant at the time of the publication, and that proof of its discovery afterward may not be received in evidence;

3rd. That the principal is not criminally liable for criminal acts of an agent, even where the appointment is unlawful, unless the principal actually participates in or profits by the agent's acts;

4th. That deposit of funds in a checking account did not constitute a loan within the meaning of the statute (section 65-5-63, A.C.L.A. 1949); and

5th. That all evidence of loss of public funds was immaterial and inadmissible.

Since the facts are either admitted or established by the uncontroverted evidence, showing diversion

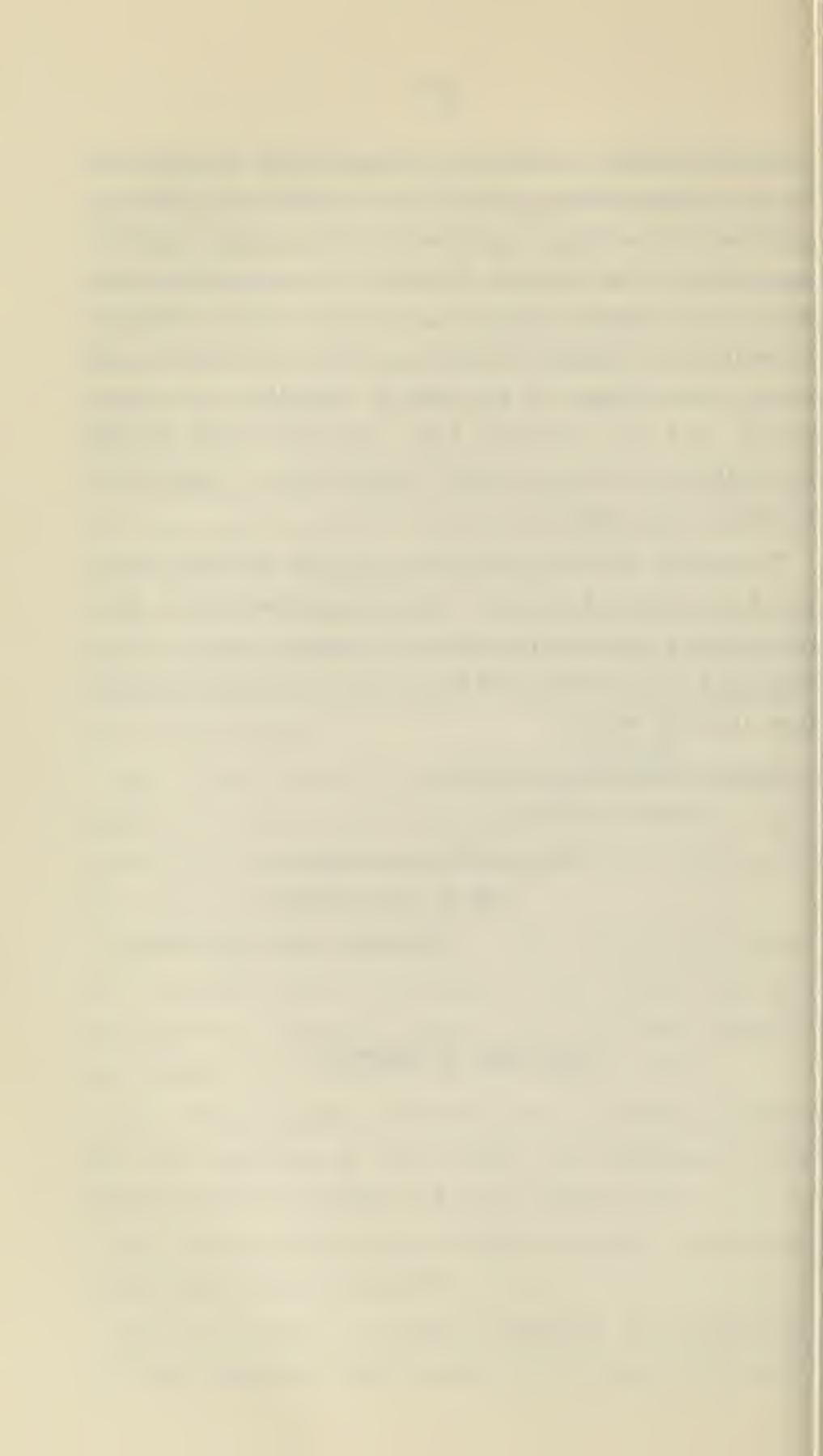
of public funds, a refusal to deposit them as required by law, loans to the bank and to Coughlin and Homer, and the loss of funds as shown by the Arthur Anderson report (Defendant's Exhibit E), a complete parallel to the *Oscar Olson* case in the receipt and disbursement of public funds was fully established, and since the criticism of the acts of appellees was privileged, and the comment fair, the trial court should have dismissed the amended complaints or instructed a verdict for appellant.

Therefore, it is respectfully requested that the judgment be reversed and the cases remanded to the District Court with instructions to dismiss each of the amended complaints, and that costs be awarded appellant in both courts.

Dated, ^{Anchorage}~~Anchorage~~, Alaska,
June 25, 1956.

Respectfully submitted,
H. L. FAULKNER,
Attorney for Appellant.

(Appendix A Follows.)



Appendix.

Appendix A

ALASKA COMPILED LAWS ANNO. 1949.

§ 7 1-9. Embezzlement: Penalty. If the Treasurer of the Territory of Alaska, or any person exercising the duties of that office, shall fail, neglect or refuse, to account for or pay over, all moneys in his hands as said Treasurer in accordance with law, or shall unlawfully convert to his own use in any manner whatever, or to the use of another not lawfully entitled thereto, or use by way of investment in any kind of property, or loan without authority of law, any portion of the public money intrusted to him for safe keeping, transfer or disbursement, or unlawfully convert to his own use, or to the use of another not entitled thereto, money or other property which may come into his hands by virtue of his office he shall be deemed guilty of the embezzlement of so much of the money or property as is thus taken, converted, invested, used, loaned, or unaccounted for, and upon conviction thereof he shall be subject to the same punishment as is otherwise provided in the laws of Alaska for the crime of embezzlement. (L 1929, ch 118, § 19, p 291, effective May 2, 1929; CLA 1933, § 3192.)

